Supreme Court, U.S.
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87-1934

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANNE DORE McLAUGHLIN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,
Respondent

vs.

GLASSBORO SERVICE ASSOCIATION, INC.,
Petitioner

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether an employer whose employees are otherwise paid minimum wage is in violation of 29 U.S.C. 201 et seq., the Fair Labor Standards Act, where those employees pay their own transportation expenses from the locus of their recruitment to the farms where they actually commence their employment?

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## OPINIONS BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court was entered on February 8, 1988 without opinion. The judgment affirmed was entered by way of Order of the United States District Court for the District of New Jersey dated July 23, 1987, (App. 70a). The Order of the District Court was accompanied by a Letter Opinion dated July 23, 1987, (App. 24a). The prior opinions of the United States District Court for the District of New Jersey are dated August 25, 1983 (unofficial opinion attached at App. 22a), November 5, 1981 (unofficial opinion attached at App. 16a), and December 4, 1979, unofficially reported as Marshall vs. Glassboro Service Association at 87 CHH Labor Cases para.

33,865 (D.N.J. 1979), aff.d 639 F. 2d 744 (3rd Cir. 1980), cert. den. 450 U.S. 1040 (1981). The opinion of the District Court in Marshall vs. Glassboro Service Association is attached (App. 1a).

## JURISDICTION

The statutory basis of jurisdiction in this matter is as follows. The United States District Court for the District of New Jersey had jurisdiction of this action under 28 U.S.C. Sect. 1331 and 29 U.S.C. Sect. 217. The United States Court of Appeals for the Third Circuit had appellate jurisdiction of the matter pursuant to 28 U.S.C. Sect. 1291. The United States Supreme Court has jurisdiction of the matter pursuant to 28 U.S.C. Sect. 1254(1).

Judgment was entered in this matter on February 8, 1988. There was no application for re-hearing.

The Notice of Appeal which brought the matter before the United States Court of Appeals for the Third Circuit was filed on September 8, 1987.

## STATUTES INVOLVED

### United States Statutes

29 U.S.C. Sect. 203 (m)

"Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, that the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular

employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage of a tipped employee, the amount paid such employee by his employer shall be deemed to be increased on account of tips by an amount determined by the employer, but not by an amount in excess of 50 per centum of the applicable minimum wage rate, except that the amount of the increase on account of tips determined

by the employer may not exceed the value of tips actually received by the employee. The previous sentence shall not apply with respect to any tipped employee unless (1) such employee has been informed by the employer of the provisions of this subsection, and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Federal Regulations

29 C.F.R. Sect. 531.31 - "Customarily" furnished.

The reasonable cost of board, lodging, or other facilities may be considered as part of the wage paid an employee only where "customarily" furnished to the employee. Where such facilities are "furnished" to the

employee, it will be considered a sufficient satisfaction of this requirement if the facilities are furnished regularly by the employer to his employees or if the same or similar facilities are customarily furnished by other employees engaged in the same or similar trade, business, or occupation and the same or similar communities. See Walling vs. Alaska Pacific Consolidated Mining Co., 152 F. 2d 812 (C.A. 9), cert. denied, 327 U.S. 803; Southern Pacific Company vs. Joint Counsel (C.A. 9), 7 W.H. Cases 536. Facilities furnished in violation of any Federal, State, or local law, ordinance or prohibition will not be considered facilities "customarily" furnished.

29 C.F.R. Sect. 531.32 - "Other" facilities.

(a) "Other facilities" as used in this section, must be something like

board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, fire wood and lumber slabs), electricity, water, and gas furnished for the non-commercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the act and the transportation is not an incident of and necessary to the employment. (...)

(c) It should also be noted that Sect. 531.3(d)(1), the cost or furnishing "facilities" which are primarily for the benefit of convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in Sect. 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered "facilities" within the meaning of Sect. 3(m) include: Safety caps, explosives, and miner's Lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; "dues" to Chambers of Commerce and other

organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of a maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workman's compensations acts, or similar Federal, State or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee. For a discussion of reimbursement for expenses such as "supper money", "travel expenses", etc., see Section 778.217 of this chapter.

29 C.F.R. 778.217 - Reimbursement for

expenses.

(a) General Rule. Where an employee incurs expenses on his employer's behalf or where he is required to expend sums solely by reason of action taken for the convenience of his employer, Sect. 7(e)(2) is applicable to reimbursement for such expenses. Payments made by the employer to cover such expenses are not included in the employee's regular rate (if the amount of the reimbursement reasonably approximates the expenses incurred). Such payment is not compensation for services rendered by the employees during any hours worked in the work week.

(b) Illustrations. (...)

(3) The actual or reasonably approximate amount expended by an employee who is traveling "over the road" on his employer's business for transportation (whether by private car

or common carrier)...

(5) The actual or reasonably approximate amount expended by an employee as temporary excess home-to-work travel expenses incurred (i) because the employer has moved the plant to another town before the employee has had the opportunity to find living quarters at the new location or (ii) because the employee, on a particular occasion, is required to report for work at a place other than his regular workplace.

## STATEMENT OF THE CASE

This appeal concerns the payment by migrant laborers recruited by appellant of their own transportation expenses from Puerto Rico to New Jersey farms. Glassboro Service Association, Inc. (Glassboro), a New Jersey corporation, is an association of farmers registered as a farm labor contractor. Glassboro's function is to recruit migrant laborers and to provide them with employment at various member farms throughout each farming season. It performs this function pursuant to written agreement with the Commonwealth of Puerto Rico. For doing so, it receives a percentage of each worker's wages from the employing farm as compensation.

A major problem in the recruitment of migrant laborers is defection of the laborers from their employment prior to completing the season, or even prior to

commencing actual employment at a farm in the mainland United States. A substantial percentage of workers use the recruitment process as a means of inexpensive travel to the mainland United States and then depart, leaving Glassboro without employees for its member farms and therefore without compensation for recruiting the workers and arranging for their transportation.

To attempt to minimize the percentage of recruits who fail to commence employment or work through the season, Glassboro has, over the years, attempted to develop a system of recruitment providing workers with incentive to remain employed throughout the season. This was originally accomplished, between 1974 and 1976, through the air and bus transportation of workers by Glassboro from Puerto Rico to New York and later New Jersey, and

compulsory deduction of a portion of travel expenses from workers' weekly pay checks throughout the season. At the conclusion of the season, every worker who has remained employed at his or her assigned farm received a rebate of the entire transportation expense, together with a return ticket to Puerto Rico.[1]

The practices described were the subject of a complaint filed by the

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[1] The hourly wages for each laborer were as follows:

1974 - $2.13
1975 - $2.30
1976 - $2.40
1977 - $2.65
1978 - $2.65
1979 - $2.90
1980 - $3.10
1981 - $3.35
1982 - $3.35
1983 - $3.35
1984 - $3.35
1985 - $3.35
1986 - $3.50
1987 - $3.50
1988 - $3.65

The Department of Labor contended that the deduction and refund of transportation expenses reduced each worker's wage below the statutory minimum.

Department of Labor on February 22, 1978, alleging violations of 29 U.S.C. 201 et seq., the Fair Labor Standards Act. There was no trial: the Court entered summary judgment for the Department of Labor as to compulsory payment by the workers of their transportation costs, but denied summary judgment for the Department of Labor as to damages. In an attempt to comply with the order of the Court while still motivating workers to complete the season, in 1980 and 1981 Glassboro once again recruited workers, and to a portion of these it loaned transportation expenses which the workers voluntarily agreed to repay to Glassboro. And once again, every worker who completed the season was rebated the transportation expense and provided with free return transportation to Puerto Rico. This practice elicited a motion for contempt

against Glassboro from the Department of Labor culminating in a contempt order, again without a hearing, enjoining a loan repayment method of transportation of workers to the mainland.

Glassboro thereafter redoubled its effort to arrive, with the Department of Labor, at a means of recruitment and transportation that would effectuate its goal of motivating workers to complete the season without violation of 29 U.S.C. 201 et seq., the Fair Labor Standards Act. Before a consensus with the Department of Labor had been achieved, however, a new season had been commenced in 1982. At this time, Glassboro's agreement with the Commonwealth of Puerto Rico provided that all workers were independently to pay their own transportation expenses to member farms. Any worker who completed the season would receive rebate of the expense together

with return transportation to Puerto Rico. Between 1982 and 1985, workers paid their own transportation expenses from Puerto Rico to New Jersey farms, received minimum wage of $3.35 per hour for as long as they worked, and were rebated transportation costs to New Jersey together with return transportation to Puerto Rico if they completed the season.

Glassboro's practice of independent worker payment of transportation expense elicited a second contempt motion by the Department of Labor directed at Glassboro for the years 1982 through 1985 when workers were paid minimum wage. Commencing in 1986, workers were paid in excess of minimum wage and the Department of Labor has acknowledged that the difference more than compensates for payment of transportation expenses and therefore

does not give rise to even putative reduction of wages below the statutory minimum (Brief of Department of Labor, in the United States Court of Appeals for the Third Circuit p. 4, n. 4). The District Court once again denied a hearing and held Glassboro in contempt, and on appeal the Third Circuit affirmed without opinion.

It is clear from the procedural history in this matter that the District Court interprets relevant law to require an employer to furnish all transportation expenses of any employee from point of recruitment to the place where the employee actually commences employment. It is Glassboro's contention that 29 C.F.R. 531 clarifies 29 U.S.C. 201 to require payment of transportation expenses only after the employee commences employment and for transportation necessitated in the course

of employment. The District Court in its order for summary judgment for the Department of Labor and in its first and second contempt orders, flatly rejected this contention; the Third Circuit has affirmed that interpretation of the law. This question is at the core of the present application.

The Fair Labor Standards Act, 29 U.S.C. 201 et seq., sets forth the minimum wage to be paid to agricultural workers, at 29 U.S.C. 206(a)(5), but does not address the question of which expenses incidental to their employment may be set off against wages. 29 C.F.R. 531.1 et seq., clarifies the issue by classifying these incidental expenses, known as facilities, into two categories: (a) facilities primarily for the benefit of the employee, the reasonable cost of which may be considered as part of wages, and (b)

facilities primarily for the benefit of the employer, the reasonable cost of which may not be counted against the employee's wages, 29 C.F.R. 531.3(d). Lists of facilities considered primarily for the benefit of the employer are set forth at 29 C.F.R. 531.3(d)(2) and 29 C.F.R. 531.32 (which specifically discusses transportation expenses "incident of and necessary to employment"). Moreover, 29 C.F.R. 778.217 clarifies what expenses incurred by an employee must be reimbursed to the employee; these are expenses incurred by the employee "on behalf of" or "for the convenience of" the employer and include transportation expenses incurred while "traveling on the employer's business".

In its Administrative Opinion No. 262, the Department of Labor has taken the position that "the cost of transporting employees to and from the

point of hire (is) a cost to be borne by the employer, and not the employee, as a cost incidental to the employer's recruitment program". Petitioner contends that the position taken by the Department of Labor conflicts with the interpretation of the Fair Labor Standards Act, provided by Federal Regulations cited above, specifically 29 C.F.R. 531.32 and 29 C.F.R. 778.217. Because Glassboro does not benefit at all from the presence of the employee in New Jersey until the employee actually, willingly, commences employment, it is submitted that the expenses of the transportation of the employee to the mainland United States from Puerto Rico are not primarily for the benefit of the employer and therefore constitute a facility primarily for the benefit of the employee.

## REASONS FOR GRANTING THE WRIT

It is submitted that the issue of an employer's liability for a minimum wage employee's pre-employment transportation expenses has far-reaching consequences. There are thousands of migrant laborers employed throughout the United States seasonally at minimum wage. This case presents a question which has never before been squarely addressed in a published opinion and which substantially affects the means by which migrant laborers in particular, and all minimum wage workers generally, may be recruited and transported to their place of employment. An opinion in this case will also affect the circumstances under which an employer must furnish other "facilities" such as clothing or equipment free of charge to minimum wage employees, thereby rendering certain types of employment

more or less palatable to employers or to employees.

## CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the opinions, judgment and orders of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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